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No. 97-569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of the Court. The brief urges this Court to reverse the decision below, and thus supports the position of Petitioner, Burlington Industries, Inc., before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

[1] Counsel for EEAC authored the brief in its entirety. No person or entity, other than EEAC, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination charges, EEAC's members have a substantial interest in the legal standards for determining when workplace conduct constitutes actionable "sexual harassment" under Title VII.

EEAC's members are committed to maintaining workplaces that are free from discrimination, including sexual harassment. Likewise, EEAC's member companies are well aware that discrimination, including sexual harassment, is unlawful. EEAC's member companies long ago recognized that workplace discrimination, including sexual harassment, not only is against the law, but also is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company.

Accordingly, EEAC's members have expended substantial resources and significant efforts to combat workplace sexual harassment. They have adopted policies expressing their commitment to the right of all employees to be free from sexual harassment in the workplace and categorically forbidding supervisors and employees from engaging in sexually harassing conduct. They have communicated

those policies to all employees at new employee orientation and other appropriate opportunities. They have publicized those policies in employee manuals and hand-delivered and posted notices. They have conducted frequent and repeated seminars, training sessions, and briefings to teach supervisors and employees to recognize and halt harassment in the workplace.

In addition, EEAC's members have implemented formal anti-harassment procedures that encourage witnesses as well as victims to report sexual harassment to management. These procedures call for rapid, thorough investigation and prompt, effective remedial action where warranted, including discipline and, where appropriate, discharge of offenders. Moreover, EEAC members have taken steps to ensure that these procedures are accessible to employees and that employees are aware of both their purpose and their effect.

Thus, the issue before the Court is extremely important to the nationwide constituency that EEAC represents. The court below held that an employer can be held strictly liable for sex discrimination in violation of Title VII on a "*quid pro quo*" theory of sexual harassment based solely on a supervisor's sexual advances which the plaintiff refused, even though her refusal did not result in any tangible effect on her compensation, terms or conditions of employment. Under this view, an employer could be held liable for a supervisor's sexual advances despite its efforts to prevent such behavior, in the absence of any tangible harm, without any showing that the conduct reached the level of severity and pervasiveness established by this Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), for a Title VII violation resulting from a sexually hostile environment.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme

courts. As part of this activity, EEAC participated as *amicus curiae* in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris*, as well as two cases currently pending in this Court addressing sexual harassment issues, *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997) (same-sex harassment); *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997) (employer liability for environmental harassment). Thus, EEAC has an interest in, and a familiarity with, the issues and the policy concerns involved in this case.

EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Kimberly Ellerth was hired by Burlington Industries as a merchandising assistant in the House Mattress Ticking Division in March 1993. Pet. App. 243a-244a. In March 1994, she was promoted to a sales representative position in the same division. Pet. App. 244a. In each job, her direct supervisor reported to one Theodore Slowik. *Id.*

In May 1994, Ellerth's supervisor and the Customer Service Manager received some complaints about Ellerth and sent her a memorandum about them. Pet. App. 252a. Ellerth quit a week later. *Id.* In June, she sent her former supervisor a letter saying that she had quit because Slowik was sexually harassing her. *Id.*

According to Ellerth, the harassment began at her preemployment interview, when Slowik asked probing questions about her plans to have a family and stared at her in a sexual way. Pet. App. 244a-245a. During her employment, she spoke to Slowik approximately once a week and saw him for a day or two each month or two. Pet. App. 244a. She contends that on numerous occasions, Slowik told off-color jokes in her presence, stared at her, and made various personal remarks. Pet. App. 245a-249a. On one occasion in the summer of 1993, Ellerth says, Slowik said, "You know, Kim, I could make your life very hard or very easy at Burlington." Pet. App. 247a. Ellerth also alleges that, during her promotional interview, Slowik rubbed her knee under the table. Pet. App. 249a.

Ellerth knew that Burlington had a policy against sexual harassment; she had read the policy in her employee handbook. Pet. App. 251a. She never told anyone in authority at Burlington about Slowik's conduct during her employment, although she did complain to several coworkers, a customer, and her husband and parents. Pet. App. 251a.

Ellerth sued Burlington for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district court granted Burlington's motion for summary judgment. Pet. App. 287a. The district court ruled that the generally accepted "negligence" standard applicable to hostile environment cases, rather than the "strict liability" standard often applied to *quid pro quo* cases, should be used in cases involving a "hostile work environment context wherein the hostile environment was created, in part, by *quid pro quo* insinuations. . . ." Pet. App. 284a. Applying the "negligence" standard, the district court concluded that the absence of notice to Burlington precluded liability. Pet. App. 284a.

Ellerth appealed. In January 1997, a panel of the Seventh Circuit reversed the district court's decision, treating the case as one primarily involving *quid pro quo* harassment. Pet. App. 209a. The Seventh Circuit then granted rehearing *en banc* and vacated the panel decision. Pet. App. 240a.

The *en banc* court combined the case with a similar case then pending before another panel, *Jansen v. Packaging Corp. of America*. Pet. App. 2a. A majority of the *en banc* court concluded that "[1] the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability; and that [2] liability for quid pro quo harassment is strict even if the supervisor's threat does not result in a company act." Pet. App. 7a. Accordingly, the *en banc* court affirmed the district court's judgment in favor of Burlington on the hostile environment issue, but reversed and remanded on the *quid pro quo* issue. *Id.*

Burlington petitioned this Court for a writ of *certiorari*, which was granted on January 23.

SUMMARY OF ARGUMENT

The court below erred in holding that a *quid pro quo* claim of sexual harassment can be maintained even though the plaintiff neither submitted to sexual advances nor suffered a tangible job detriment. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . ." Under *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), sex-based workplace conduct violates Title VII if it meets established standards of severity or pervasiveness. Conduct that does not meet those standards is actionable only if it otherwise violates Title VII.

Quid pro quo harassment by definition requires that a tangible job detriment or benefit be conditioned on the grant or denial of sexual favors. If either the *quid* or the *quo* is missing, sex-based conduct is not actionable

unless it is sufficiently severe or pervasive to constitute a hostile environment.

Accordingly, contrary to the decision below, a mere threat of a job detriment in exchange for withholding sexual favors cannot constitute *quid pro quo* harassment. While frequent or protracted demands may indeed affect the "terms and conditions" of employment, they do so only because they create a hostile environment, not because they are a *quid pro quo*.

In either a hostile environment or *quid pro quo* case, an employer should be shielded from liability where the plaintiff fails to take advantage of a well-communicated express policy against sexual harassment and an adequate procedure for resolving claims. This Court ruled in *Meritor* that employers are not always automatically liable for sexual harassment by their employees. Indeed, the Court strongly suggested that a well disseminated, express policy prohibiting sexual harassment, coupled with a procedure that encouraged victims to come forward, might obviate employer liability where the victim failed to complain. Strong public policy supports encouraging employers to adopt such policies and procedures. For the same reasons, employers should not be held liable if they act promptly and appropriately upon receiving a sexual harassment complaint, including restoration of any benefits lost as the results of a *quid pro quo*.

ARGUMENT

I. LIABILITY FOR A TITLE VII VIOLATION FOR SEXUAL HARASSMENT UNDER THE *"QUID PRO QUO"* THEORY REQUIRES BOTH A *"QUID"* AND A *"QUO"*

A. Title VII Prohibits Discrimination in the Fact of Employment and in Compensation, Terms, Conditions or Privileges of Employment Because of a Protected Characteristic

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). Accordingly, under this Court's decisions, the plaintiff in a Title VII disparate treatment case at all times retains the burden of proving to the trier of fact that an employment action was taken for a reason prohibited under the statute. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

While "the burden of establishing a prima facie case of disparate treatment is not onerous," *id.*, the occurrence of an adverse employment action is a necessary element. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("[T]he complainant . . . must carry the initial burden by showing . . . (iii) that, despite his qualifications, he was rejected . . . ."). *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993) ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken *adverse employment action* by reason of (in the context of the present case) race.") (emphasis added); *International Bhd. of Teamsters v. United States*, 431

U.S. 324, 358 (1977) ("The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that *an employment decision* was based on a discriminatory criterion illegal under the Act.") (emphasis added).

Thus, in order to make out a *prima facie* case of disparate treatment under Title VII, a plaintiff must prove as a necessary element that an unlawful employment practice occurred, *e.g.*, that the employer failed or refused to hire, discharged, or otherwise discriminated with respect to compensation, terms, conditions or privileges of employment, because of a protected characteristic.

B. Workplace Sexual Conduct Violates Title VII Only If It Constitutes Discrimination in the Fact of Employment or in Compensation, Terms, Conditions or Privileges

1. *Environmental Harassment Is Actionable Only If It Meets Established Standards of Severity or Pervasiveness Under* Meritor *and* Harris

In *Meritor Savings Bank, FSB v. Vinson*, this Court concluded that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor*, 477 U.S. at 66. Quoting guidelines issued in 1980 by the Equal Employment Opportunity Commission, the Court noted that "the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include '[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.'" *Id.* at 65 (quoting 29 C.F.R. § 1604.11 (a) (1985)). Further, the Court continued,

> the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," *whether*

> *or not it is directly linked to the grant or denial of an economic quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

Id. (emphasis added) (quoting 29 C.F.R. 1604.11(a)(3)). The Court then agreed with the Guidelines' interpretation that "hostile environment" harassment was actionable. *Id.* at 66.

In so doing, the Court noted that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition or privilege' of employment within the meaning of Title VII. . . ." *Id.* at 67. Instead, this Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.*

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court elaborated on the principle enunciated in *Meritor*, holding that a plaintiff need not show "tangible psychological injury" in order to establish a case of environmental harassment. *Id.* at 21. At the same time, the Court reinforced its holding in *Meritor* that not all offensive conduct is actionable. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.*

Accordingly, under *Meritor* and *Harris*, workplace sexual conduct that is not directly linked to the grant or denial of an economic *quid pro quo* may still be actionable under the "hostile environment" theory—but only if it rises to the level established by this Court.

2. *By Definition, Sexual Harassment Is* Quid Pro Quo *Only If a Tangible Job Detriment or Benefit Is Conditioned on Sexual Favors*

A *quid pro quo* claim arises when sexual favors are demanded as the price for granting a job benefit or refraining from inflicting a job detriment. *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982) ("An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."). "As the name suggests, '[t]he gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual black-mail and that adverse consequences follow from the employee's refusal.'" *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir. 1995) (quoting *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989)). "*Quid pro quo* sexual harassment is anchored in an employer's sexually discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments." *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986). *See also Reinhold v. Virginia*, No. 96-2816, 1998 WL 45247, at *14 (4th Cir. Feb. 6, 1998) ("Quid pro quo sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or a tangible job detriment on the employee's acceptance or rejection of sexual advances.").

Accordingly, both the "*quid*" and the "*quo*" are necessary elements of a *prima facie* case for a *quid pro quo* claim. "The acceptance or rejection of the harassment . . . must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability . . . ." *Henson v. City of Dundee*, 682 F.2d at 909; *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990) (same language) (citing *Henson*); *Jones v. Flagship Int'l*, 793 F.2d 714, 722 (5th Cir.

1986), *cert. denied*, 479 U.S. 1065 (1987) (same language) (citing *Henson*); *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986) (citing *Henson*); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). *See also Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995) (one element of *prima facie* case is that "her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment").[2]

Meritor stands for the proposition that a tangible economic detriment is not always essential to a finding of unlawful sexual harassment, because sex-based conduct creating a hostile or abusive work environment is actionable as well. Absent a hostile or abusive work environment, sexual harassment meets Title VII's requirement of "discriminat[ion] against any individual with respect to his compensation, terms, conditions or privileges of employment" only if such discrimination actually occurs.

Accordingly, where either the "*quid*" or the "*quo*" is missing, the case cannot proceed. *E.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987) (affirming summary judgment for employer where there was no "suggestion to [plaintiff]—either explicitly or implicitly—that her employment was conditioned on granting sexual favors . . ." and that "adverse job consequences . . . were due solely to her inadequate job performance"); *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548 (11th Cir. 1987) (finding no viable *quid pro quo* cause

[2] Absent direct evidence that a tangible job detriment occurred because of a refusal to grant sexual favors, where a *quid pro quo* plaintiff *does* establish a *prima facie* case, the burden of persuasion shifts to the defendant to articulate a legitimate, nondiscriminatory business reason for the challenged employment action. *Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990). *Cf. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

of action where evidence was lacking that supervisor demanded sexual favors in exchange for a tangible job benefit); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (affirming dismissal of claim because although threat of adverse job consequences was made, it was not carried out); *cf. Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1990) (permitting claim to proceed where evidence showed that plaintiff was terminated for "stonewalling" supervisor's advances).

This view is consistent with the EEOC Guidelines, which describe the type of sexual harassment that is linked to a *quid pro quo* as occurring when "(1) *submission* to such conduct is *made* either explicitly or implicitly a term or condition of an individual's employment, [or] (2) *submission* to *or rejection* of such conduct by an individual is *used* as the basis for employment decisions affecting such individual. . . ." 29 C.F.R. § 1604.11(a) (emphasis added).

3. *A Mere Threat to Condition a Job Benefit or Detriment on the Grant or Denial of Sexual Favors Is Not* Quid Pro Quo *Harassment If It Is Unsuccessful*

The "classic" *quid pro quo* case violates Title VII because the victim's rejection of sexual advances actually results in the employer's failing to hire or terminating her, or imposing some other adverse effect on the victim's "compensation, terms, conditions or privileges" of employment. Where either necessary element of a *quid pro quo* claim is missing, the plaintiff fails to establish a *prima facie* case of a Title VII violation.[3]

Thus, an unfulfilled threat of adverse consequences is not sufficient to support a *quid pro quo* claim. "[I]t

[3] Of course, if there was no demand for sexual favors, there can be no claim of discrimination "because of . . . sex" as Title VII requires.

takes more than saber rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995).

The adverse effect need not be termination—although termination of an employee for refusal to submit to sexual advances certainly would suffice. The *quid pro quo* may occur "by altering the conditions and privileges of [the victim's] employment in tangible and detrimental ways." *Reinhold*, 1998 WL 45247, at *15 (imposing greater work assignments and withholding opportunity to attend a professional conference). *See also Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994) (depriving victim of a "fair evaluation of her work" was sufficient "deprivation of a job benefit" for *quid pro quo* purposes); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (victim entitled to new trial on *quid pro quo* claim where trial judge failed to consider evidence that her rejection of sexual advances led to denial of opportunity to attend police academy).[4]

Likewise, actionable *quid pro quo* harassment may occur when the victim *submits* to sexual advances to avoid the loss of a tangible job benefit or the imposition of a tangible job detriment. *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 114 S. Ct. 2963 (1994).[5] Here, the *quid pro quo* requirement is fulfilled

[4] Indeed, it is arguable that the required tangible job detriment need not be economic in nature, as the Sixth Circuit speculated but did not decide in *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). In that circumstance, however, the Sixth Circuit observed, "there may be a *de minimis* exception for temporary actions, such as in this case, where further remedial action is moot and no economic loss occurred." *Id.*

[5] Where an alleged victim participates in sexual behavior, the issue then becomes, not whether the participation was "voluntary," but whether it was "unwelcome." *Meritor*, 477 U.S. at 68. Where a *quid pro quo* situation is alleged, part of this inquiry must be whether the victim reasonably believed that adverse action would occur if she refused, including whether or not the aggressor actually had the ability to impose a tangible job detriment.

where the victim reasonably believes that a tangible job detriment will be imposed if she does not submit, and submits to avoid the detriment.

But there has to be one or the other. Either the victim refuses—and suffers a tangible job detriment—or the victim submits—and as a result avoids the detriment. *Karibian*, 14 F.3d at 779 ("once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out, regardless of whether the employee (a) rejects the advances *and suffers the consequences*, or (b) submits to the advances *in order to avoid the consequences*.") (emphasis added).

If the purported victim has been the target of sexual advances but the tangible job detriment or benefit is missing, she may have a "hostile environment" claim if the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment" as required by *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21. Of course, unwelcome sexual advances are offensive, and more so when the aggressor purports to link submission to a job detriment or benefit. But it is important not to "confuse[] tangible job detriment with distress or psychological harm, an intangible detriment." *Jones v. Flagship Int'l*, 793 F.2d 714, 721 (5th Cir. 1986). "[T]he absence of [a tangible job] detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Id.* at 720.

It is here that the court below erred. According to Judge Flaum, "a clear and serious *quid pro quo* threat

alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." Pet. App. 17a. Indeed it may, but only when the threat is "serious" enough to create a hostile working environment. It is precisely because the threat is serious that it alters the "terms and conditions" of employment. Indeed, by Judge Flaum's own words, were the threat not "serious" it would not constitute a violation.

While concluding that a "company act" is necessary to a *quid pro quo* claim, Judge Posner suggested that his idea "is, for sure, not the orthodox approach." Pet. App. 52a-53a. We respectfully submit that Judge Posner is too self-critical. Far from having a "mere footing in the case law" and "the curse of novelty," Judge Posner's conclusion is well-founded in discrimination law.

Indeed, the Third is the only circuit to have said squarely that a "threat" is sufficient. *Robinson v. Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997). This statement, however, rightfully is *dicta*, since the only actual finding of *quid pro quo* in *Robinson* was that the plaintiff was denied a transfer because she refused sexual advances. *Id.* at 1298.[6]

For the foregoing reasons, the absence of either the "*quid*" or the "*quo*" prevents a plaintiff from establishing a *prima facie* case of sexual harassment under the *quid pro quo* theory. In the instant case, both are absent, since Ellerth neither submitted to Slowik's advances nor suffered a tangible job detriment as a result.

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[6] Although the Third Circuit cited the Second Circuit's decision in *Karibian* in support of its conclusion that a threat was sufficient, a careful reading of *Karibian* shows that it does not. The language quoted—that the employer is liable whether the employee submits or not—is tied inextricably to the Second Circuit's ruling, discussed above, that employees who *submit* can bring a *quid pro quo* claim in appropriate circumstances, and not just those who refuse. *Karibian*, 14 F.3d at 778.

II. AN EMPLOYER SHOULD BE SHIELDED FROM LIABILITY WHERE THE PLAINTIFF FAILS TO TAKE ADVANTAGE OF A WELL COMMUNICATED, EXPRESS POLICY AGAINST SEXUAL HARASSMENT AND AN ADEQUATE PROCEDURE FOR RESOLVING CLAIMS, OR WHERE THE EMPLOYER HAS TAKEN PROMPT AND APPROPRIATE ACTION

A. This Court Held in *Meritor* That Employers Are Not Always Automatically Liable for Sexual Harassment by Their Supervisors, But Required Instead That Courts Apply Common Law Agency Principles

This Court has refused to hold employers automatically liable for sexual harassment by their supervisors under all circumstances. *Meritor*, 477 U.S. at 72. In *Meritor*, both parties sought to have the Court establish a standard for employer liability. The plaintiff argued for strict liability, contending that Title VII's definition of "employer" as including an "agent" requires employer liability whenever a supervisory employee is involved. 477 U.S. at 70. The employer, on the contrary, contended that it could not be held liable for a supervisor's misconduct unless it had notice and failed to take action. *Id.*

While the Court "decline[d] the parties' invitation to issue a definitive rule," 477 U.S. at 72, it did reject an automatic liability standard, holding that, "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*

Instead, the Court said:

> [W]e agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C.

> § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. . . . See generally Restatement (Second) of Agency §§ 219-237 (1958).

Id.

The sections of the Restatement to which the Court referred, which address the liability of a master for torts committed by a servant, do not hold an employer responsible for every act of every employee. The relevant portions of § 219(2) explain generally that a master is not liable for actions outside the scope of employment unless the employer was negligent or reckless, or the servant acted with apparent authority or was aided in the accomplishment of the tort by the existence of the agency relation.[7]

Under any of the agency principles that are adaptable for use in sexual harassment cases, the existence of an express, well communicated policy against discrimination, coupled with an accessible complaint procedure that leads to prompt and effective action where harassment is found, shields the employer from liability.

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[7] Section 219 provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219 (1958).

B. Sexual Harassment Is Virtually Always Outside of the Scope of a Supervisor's Employment

A supervisor generally acts within the scope of employment when he or she hires, fires, disciplines, promotes, or directs the day-to-day work of the employees he or she supervises.[8] Under agency principles, sexual harassment is not within the scope of employment.

According to the Restatement, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228(2) (1958). In Policy Guidance issued by the Equal Employment Opportunity Commission, the federal agency having enforcement authority over Title VII, the agency noted that "[i]t will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment." *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, *reprinted in*, *EEOC Compliance Manual* (BNA), N:4031, 4055 (Mar. 19, 1990) ("EEOC Policy Guidance").

Similarly, sexual harassment cannot be said to "serve the purposes" of the employer; precisely the opposite is true. Sexual harassment—or any form of harassment, for

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[8] The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency § 228(1) (1958).

that matter—is likely to be distracting, demoralizing, and ultimately debilitating to an employee's productivity. An employee who has to "run a gauntlet of sexual abuse," *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted in *Meritor*, 477 U.S. at 67), likely will have difficulty focusing on the work for which she is paid. Thus, if anything, sexual harassment is antithetical to the purposes of the employer.

Where there is any doubt, the fact that an employer has specifically forbidden an act is, under traditional agency principles, evidence that the act is outside the scope of employment.[9] An example offered by the Restatement explains, "where a person employs another to make collections, a specific direction by such employer that servants shall not use force in seeking to collect debts is a factor tending to show that an assault made by the servant to enforce collection is not within the scope of employment." Restatement (Second) of Agency § 230 cmt. c. (1958). Thus, the existence of a company policy forbidding sexual harassment is evidence that conditioning sexual favors on tangible job benefits or detriments is not within the scope of a supervisor's employment.

C. A Well Communicated Policy Prohibiting Sexual Harassment, Coupled With an Effective Remedial Procedure, Precludes Employer Liability Under Both "Apparent Authority" and "Negligence" Theories Where the Victim Fails to Use Them

An employer cannot be held responsible for *quid pro quo* harassment under either an "apparent authority"

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[9] Restatement (Second) of Agency § 230 cmt. c. (1958) states in pertinent part:

> Prohibition to do any acts except those of a certain class may indicate that the scope of employment extends only to acts of that class. Furthermore, the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment.

theory or on negligence grounds where the employer has an express policy forbidding harassment. As the EEOC Policy Guidance states:

> an employer can divest its supervisors of . . . apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer. If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship, unless liability attaches under some other theory.

EEOC Policy Guidance at N:4056 (footnotes omitted).

Likewise, an employer cannot be held to have acted negligently where it has put in place an accessible procedure for reporting sexual harassment and the victim has failed to use it. *E.g.*, *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010 (7th Cir. 1997) (employer who published policies and pamphlets against sexual harassment, encouraging employees to come forward, and addressed the issue at employee meetings, not liable for conduct occurring before employee complained).

While this analysis customarily is used in evaluating "hostile environment" cases, it is equally applicable to *quid pro quo* cases. Where an employer has established and communicated an express policy forbidding sexual harassment, an employee cannot reasonably believe that a supervisor has the authority to condition favorable or unfavorable employment actions on the granting or withholding of sexual favors.

This Court in *Meritor* rejected the view that "the *mere existence* of a grievance procedure and *a* policy against discrimination, coupled with [a victim's] failure to invoke that procedure, must insulate [an employer] from lia-

bility." *Meritor*, 477 U.S. at 72. The Court criticized the employer's policy in *Meritor* on several grounds: that the policy merely addressed discrimination generally and did not expressly address sexual harassment, and that the complaint procedure required a victim to complain first to her supervisor, who in *Meritor* was also the harasser. *Id.* at 72-73. However, the Court also observed that "[the employer's] contention that [the victim's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73.

Based on the guidance of this Court and the EEOC, employers such as EEAC's member companies have established clear and unequivocal policies forbidding sexual harassment in the workplace, and procedures for prompt and appropriate handling of complaints. These employers have put in practice the EEOC's strong recommendation that:

> [a]n effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. *See Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance at N:4059.

When a defendant employer has in place a policy and procedure meeting these standards, allowing a Title VII recovery to a plaintiff who has failed to report harassing

conduct is tantamount to automatic liability. Where the affected employee does not make use of an anti-harassment policy, the employer has no reason to know that harassing behavior is occurring, assuming that there is no highly visible offensive conduct that would create constructive knowledge. Lacking such actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect the victim from actions contrary to company policy. Yet, having set up an aggressive anti-harassment policy and procedure, the employer cannot be said to have acted negligently or to have conferred authority on a supervisor to engage in sexual harassment.

As the EEOC's guidance suggests, a good procedure encourages employees to report incidents of harassment, and includes methods to bypass the direct supervisor if that person is also the harasser. Without the victim's cooperation, even the finest anti-harassment procedure is ineffective. Even the most conscientious employer cannot know or control every day-to-day action of every employee, and must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of an employee that violate an express company policy when the employer had no reason to know of the offensive conduct and the victim chose, for whatever reason, not to use the vehicle the employer has created and trusted for preventing such conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

D. An Employer Who Takes Prompt and Effective Action Upon Receiving a Complaint of Harassment Should Not Be Held Liable Under Agency Theories

Prompt and effective action by an employer who *is* informed of harassing behavior likewise should obviate liability. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and *bona fide* investigation, reached a rational conclusion

and took appropriate action, should be credited for those efforts. Indeed, the circuit courts of appeals have held that such actions obviate employer liability in "hostile environment" cases. *E.g., Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) ("under negligence principles, prompt and effective action by the employer will relieve it of liability"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) ("where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred . . . .").

There is no logical reason to reach a different conclusion when the case involves *quid pro quo* harassment. Where the employer, upon learning that a supervisor has imposed a tangible job detriment on an employee because she refused him sexual favors, acts promptly to eliminate the detriment, no discriminatory act has occurred. In such a situation, an employer cannot be said to have hired, fired, or otherwise discriminated against an individual "because of" sex.

In *Sims v. Brown & Root Indus. Services*, 889 F. Supp. 920 (W.D. La. 1995), *aff'd without op.*, 78 F.3d 581 (5th Cir.), *cert. denied*, 117 S. Ct. 68 (1996), a district judge in Louisiana articulated the sound policy behind this approach. In *Sims*, a female employee received numerous sexual advances from a supervisor, beginning with her job interview and continuing for nearly six months. Although Sims was given a copy of the company's policy prohibiting sexual harassment when she started work, she did not complain to anyone about the supervisor's conduct until he reduced her pay by $2.00 per hour because she continued to refuse him. At that point, Sims complained to a supervisor, who immediately reported it to Human Resources. The company responded to Sims the same day, and conducted an on-site investigation the next week. By the following week, the supervisor had been fired, and all of Sims' lost pay had been restored. Sims then quit and sued the company for sexual harassment.

In granting summary judgment for the company, the district judge commented that "Brown & Root's sexual harassment policy, which provides a clear avenue for all abused employees by way of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency." 889 F. Supp. at 929. Accordingly, the judge concluded, "[h]olding a company such as Brown & Root liable after it has taken such action would produce truly perverse incentives benefiting no one, least of all actual or potential victims of sexual harassment." *Id.* (quoting *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 795-96 (5th Cir. 1994)).

As the district court explained, a contrary result "would encourage . . . the victim . . . to be silent. That is, the victim's silence would be beneficial to her Title VII claim because it would severely limit the employer's opportunity to take *prompt* remedial action. . . This would, in turn, curtail the use of sexual harassment policies to aid thoughtful employees in rectifying the situation." *Id.* at 930 (emphasis in original).

The district judge is quite correct. Where an employer acts promptly and restores the victim to the *status quo* that existed before a tangible economic detriment occurs, the victim has suffered no loss. A rule that rewards victims who remain silent both encourages the perpetuation of sexual harassment and discourages employers from developing and maintaining procedures to combat harassment.

Such a result would undermine years of progress toward the elimination of sexual harassment in the workplace. While many employers undoubtedly will retain their strong policies because it is the "right thing to do," even they may have some trepidation about conducting a thorough investigation, since doing so may only confirm their liability.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision below should be reversed.

Respectfully submitted,

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